SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 71-6202

CHARLES R. ARMSTRONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES R. ARMSTRONG
12 Underwood Place, Northeast
Washington, D.C. 20012

Petitioner

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Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above-entitled cause on October 29, 1971.

OPINIONS BELOW

The opinion of the Court of Claims is reported, 186 Court of Claims 539, 405 F 2d 1275, Cert. den. 395 US 934, and rehearing denied 396 US 870 (1969). A copy of the opinion is annexed as Appendix A. The order of dismissal of the Independent Action, filed pursuant to Rules 60(b) (6) F R C P; and 152(b)(6), Court of Claims: *"Relief From Judgment Or Order"*. The order of dismissal provides in significant part:

"Before COWEN, *Chief Judge*, Laramore, Durfee, Davis, Collins, Skelton and Nichols, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed June 14, 1971, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, without oral argument, it is concluded that plaintiff has not properly alleged or raised any triable issue of fraud, and

IT IS ORDERED that defendant's said motion to dismiss the petition be and the same is granted and the petition is dismissed.

BY THE COURT

Oct 29, 1971 Judge Laramore
Acting for the Chief Judge"

JURISDICTION

The order of the Court of Claims was entered October 29, 1971. No petition for rehearing was made. An application for enlargement of time within which to file this petition was presented to Chief Justice Burger and was (granted or

denied), without comment. Jurisdiction of the Court is invoked pursuant to 28 USC 1255(1) (2), (1970 Edition).

QUESTION PRESENTED

Whether or not the Affidavid with Evidence annexed to petitioner's opposition, filed August 4, 1971, to motion of respondent to dismiss petition properly raised or alleged a triable issue of fraud?

STATUTES INVOLVED

There are no statutes involved herein. The Rules of the Court of Claims applicable, Rule 152(b): Relief From Judgment Or Order

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.; Response; Reply:

On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect

the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 151 (a) (2). A response to a motion under this paragraph may be filed within 15 days after the motion is served. A reply may be filed within 10 days after the service of the response. A reply may be filed within 10 days after the service of the response. (See Rule 214(c) as to duplication and number of copies.)

STATEMENT OF THE CASE

This is an independent action to impeach a judgment of the United States Court of Claims, *Armstrong v. The United States of America*, 186 Court of Claims 539, 405 F2d 1275, certiorari denied 395 US 934 (1969), rehearing denied 396 US 870. The gravamen of the case is stated at Appendix A page ___

> "The argument which plaintiff urges most strongly is that the removal was improper because the charges of inefficiency related solely to incidents before his satisfactory rating became effective."

The newly discovered evidence attached to petitioner's Affidavit properly alleges or raises a triable issue of fraud and invokes the application of the proposition of law promulgated by this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944), 322 US 238, 64 S Ct 997, 88 Ed 1250.

Petitioner respectfully submit that this is his only contention, if that evidence is insufficient to raise a triable issue of fraud, the petition should be denied.

REASONS FOR GRANTING THE WRIT

The reason for granting the writ is contained or attached hereto in Petitioner's Opposition filed August 4, 1971, in opposition to Respondent's motion to dismiss the Petition. See Appendix — B, Complaint; C, Opposition to motion to dismiss; D, Docket Entries of Court of Claims.

CONCLUSION

For the foregoing reason this petition for a writ of certiorari should be granted, if the Complaint and new evidence attached to the Affidavit filed August 4, 1971, are sufficient to raise a triable issue of fraud.

Respectfully submitted,

Charles R. Armstrong,
Petitioner,
12 Underwood Place, Northeast,
Washington, D.C. 20012.

APPENDIX A

In the United States Court of Claims

No. 54–68

(Decided January 24, 1969)

CHARLES R. ARMSTRONG v. THE UNITED STATES

George D. Gates, attorney of record for plaintiff.
LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS PETITION AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This is a suit for $60,000 more or less, the amount claimed by plaintiff for improper removal from his position with the Veterans Administration (VA). The case is before us on defendant's motion to dismiss, which will be treated as a motion for summary judgment under Rule 20(b), and on plaintiff's motion for summary judgment. The material facts in this case are not in dispute.

Plaintiff, a veteran preference eligible, was a GS–11 Architectural Engineer when on February 28, 1963, he received an Advanced Warning of Unsatisfactory Rating. On June 20, 1963, plaintiff received a memo concerning technical deficiencies in his work. This memo stated that he had 90 days to correct these deficiencies, although later this period was extended to October 2, 1963. On October 21, 1963, plain-

tiff received a notice that the Advanced Warning of Unsatisfactory Rating was withdrawn due to a procedural error and that his rating as of April 30, 1963, was satisfactory. On the same day, plaintiff also received a notice of Proposed Removal for Inefficiency. The proposal was based on seven charges, each of which cited numerous examples—82 in the first charge—of errors of judgment, omission, and commission in plaintiff's work. The letter informed plaintiff of his right to respond to the charges and to a hearing. After an agency hearing, some of the examples of errors were withdrawn from the charges but the agency found that the remaining charges were sufficient to warrant removal and plaintiff was removed for inefficiency effective July 17, 1964. Plaintiff then appealed to the Civil Service Commission (CSC) charging that the VA had not complied with its regulations governing procedures for removing employees. The CSC Appeals Examining Office, which was upheld by the Board of Appeals and Review (BAR) on October 20, 1965, found that the charges of inefficiency in plaintiff's work were supported by the evidence and that the agency complied with its own and the CSC's procedures regarding removal.

Plaintiff then filed suit in this court. To support his case, plaintiff relies on his claims that the VA violated its regulations concerning removal procedures and argues that the CSC was arbitrary and capricious in supporting his removal. For reasons to be discussed *infra*, we find no basis for plaintiff's claims, and his petition is dismissed.

The procedures which plaintiff maintains were violated are found in the VA Personnel Policy Manual, MP–5, TS–118 (July 1, 1962). They provide:

> 14. DEMOTION OR REMOVAL FOR INEFFICIENCY
>
> * * * * *
>
> c. *Steps in Procedure.* * * * before taking action to remove an employee for inefficiency, the supervisory official should consider reassignment or demotion if there is a vacant position in which the the employee could reasonably be expected to perform adequately. * * *
>
> * * * * *

f. *Demotion or Removal for Inefficiency When Employee's Current Performance Rating is Satisfactory*

(1) An employee may be demoted or removed for inefficiency in spite of a current official performance rating of satisfactory or better. * * * The charges must not consist solely of incidents which occurred prior to the assignment of the current satisfactory rating, but rather should relate primarily to subsequent developments.

* * * * *

The parties have not disputed whether the Manual is a regulation, or whether the quoted requirements are mandatory or precatory. For purposes of this case, but without establishing a precedent, we assume resolution of these questions in plaintiff's favor.

Plaintiff charges that the agency should have reassigned or demoted him as the agency Personnel Manual provides and not removed him. The VA Personnel Manual states that the agency "should consider reassignment or demotion" before removal, but the notice of October 21, 1963, stated, and the CSC found, that the agency did attempt to find plaintiff another position and there were no positions available for which he qualified. As regards demotion, apparently the agency considered GS–11 its bottom rate for architects. Plaintiff offers no evidence to refute this but simply alleges the VA should have and could have found him another position. We have searched the record and find nothing to support plaintiff's allegation, and absent any showing that the CSC finding was arbitrary and capricious, it must stand. See *Heffron* v. *United States*, 186 Ct. Cl. (decided January 24, 1969); *Liotta* v. *United States*, 174 Ct. Cl. 91 (1966); *Harrington* v. *United States*, 161 Ct. Cl. 432 (1963); *Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Indiviglio* v. *United States*, 156 Ct. Cl. 241, 299 F. 2d 266, *cert. denied*, 371 U.S. 913 (1962).

The argument which plaintiff urges most strongly is that the removal was improper because the charges of inefficiency related solely to incidents before his satisfactory rating became effective. Plaintiff claims that the satisfactory rating

was not effective until October 21, 1963, the date he received the notice of the rating and that all of the charges related to incidents before that date. It is true that all of the incidents of alleged inefficiency occurred before he received the notice of his satisfactory rating; however, that notice stated that the rating was effective as of April 30, 1963. The processing of ratings takes time and it is not unusual to have a time lag between the effective date of the rating and the date the employee is notified of his rating. We believe that the rating of satisfactory spoke as of the date it was effective, April 30, 1963.

But plaintiff claims that even if the satisfactory rating were effective April 30, 1963, the VA Personnel Manual provision was violated because four of the seven charges relate to incidents before that date, so that the charges do not "relate primarily to subsequent developments." However, the charges are worded to specify the dates when the work in question was assigned to plaintiff and not the dates when he submitted the work. Four of the projects were assigned before April 30, 1963, and plaintiff relies on the assignment dates to base his charges that more of the incidents relate to dates before the effective date of the rating and that therefore the incidents do not "relate primarily to subsequent developments." But we think that the critical dates for determining whether the incidents "relate primarily to subsequent developments" are the dates the work was submitted or perhaps later dates when the work was reviewed rather than the dates the projects were assigned to plaintiff, because not until the work was submitted could plaintiff's superior have been aware of the errors in his work. Four of the projects were submitted after April 30, 1963, and thus, in terms of sheer numbers, the charges relate primarily to developments subsequent to the effective date of his satisfactory rating.

Plaintiff also argues that the October 21, 1963, letter withdrawing the Advanced Warning of Unsatisfactory Rating in effect cancelled all of the charges against him. This warning was procedurally defective and thus had to be withdrawn. It is not withdrawn for any other reason. His work remained unsatisfactory, and the satisfactory rating was as-

signed him only because technically he could be given no other.

Plaintiff also claims his removal was in violation of the Performance Rating Act, 5 U.S.C. §§ 4301–4308 (Supp. III, 1965–1967) (formerly Performance Rating Act of 1950 as amended 64 Stat. 1098, 5 U.S.C. §§ 2001–2007). Under that provision, an employee may be removed for unsatisfactory performance but only after a 90 day advance warning and a "reasonable opportunity to demonstrate satisfactory performance." But the agency did give plaintiff a 90 day warning and an opportunity to improve. The CSC found that the agency had a series of guidance meetings after the June 20, 1963, notice to help plaintiff improve his work and apprise him of the caliber of work that was expected of him. In any event, plaintiff was removed under 5 U.S.C. § 7512 (Supp. III, 1965–1967), (Veterans' Preference Act) for specified inefficiencies. The Performance Rating Act does not control personnel action under an independent statute. *Creamer* v. *United States*, 174 Ct. Cl. 408, *cert. denied*, 385 U.S. 819 (1966). As we said in *Angrisani* v. *United States*, 172 Ct. Cl. 439 (1965), at p. 443:

> This court has stated, on numerous occasions, that the procedures of the Veterans' Preference Act, * * * and the Lloyd-LaFollette Act, * * * govern removals for cause; that the procedures of the Performance Rating Act, * * * are not applicable to such removals. * * *

An unsatisfactory performance rating is not a prerequisite to the removal of an inefficient employee. *Thomas* v. *Ward*, 225 F. 2d 953, 955 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 958 (1956); *Angrisani* v. *United States*, *supra; Chisholm* v. *United States;* 149 Ct. Cl. 8, 13 (1960). The court cannot substitute its judgment for that of the employing agency as to an employee's qualifications, if the agency's conclusion is honestly arrived at, without personal bias or malice. *Greenway* v. *United States*, 175 Ct. Cl. 350, *cert. denied*, 385 U.S. 881 (1966).

Plaintiff was a veterans preference eligible and as such his removal must accord with the provisions of that act, which it does. Both the CSC and the BAR found that the VA had complied with the procedural requirements for re-

moval and absent any showing that this finding was arbitrary and capricious it must stand. *Angrisani* v. *United States*, *supra*, at p. 443; *Houston* v. *United States*, 156 Ct. Cl. 38, 45, 297 F. 2d 838, 842, *cert. denied*, 371 U.S. 815 (1962). Plaintiff contended that the agency failed to follow its own regulations in violation of *Service* v. *Dulles*, 354 U.S. 363 (1957), but from what we have said it is clear that the agency did follow its own regulations in removing plaintiff.

Defendant in its motion to dismiss pleaded laches as a defense to plaintiff's action. Because we have disposed of this case on other grounds, we need not reach that issue. Defendant's motion to dismiss is granted. Plaintiff's motion for summary judgment is denied and his petition is dismissed.

APPENDIX B

IN THE

United States Court of Claims

No. 86-71

CHARLES R. ARMSTRONG

v.

THE UNITED STATES

COMPLAINT FOR AN INDEPENDENT ACTION: RELIEF FROM JUDGMENT, RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE

(Filed April 15, 1971)

RULE 60(b)(6), provides, inter alia:

"* * * the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * or (6) any other reason justifying relief from the operation of the judgment. * * * This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding * * *"

Case Application: Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944), 322 U.S. 238, 64 S.Ct. 997, 88 L. ed. 1250.

Commentary: 7 Moore's Federal Practice (2d ed.) 606, Par. 60.37. Substantive Basis For Independent Action.

I

This is an action by plaintiff for a declaratory judgment under the Federal Declaratory Judgment Act of June 14, 1934, as amended, 28 U.S.C. 2201 et seq.; and the Federal Rules of Civil Procedure, Rules 57 and 60(b)(6). This cause arises under the Constitution and laws of the United States, and is therefore within the jurisdiction of this court. This cause involves an actual and justiciable controversy which has arisen and now exists between plaintiff and defendants with respect to the validity and legality of a certain removal action taken against plaintiff by defendants, jointly and severally, as hereinafter described. That the amount in dispute exceeds $3,000.00, exclusive of interest and costs.

II

That plaintiff is a "Ten-point" veteran preference eligible, a citizen of the United States, and a resident of the District of Columbia; and Architectural Engineer, GS-11, at the time of the wrongful removal.

III

That defendants above designated are duly appointed and acting officials of the respective agencies aforementioned and are officially charged by law with the administration and enforcement of all laws relating to employment of all officers and employees in and under the jurisdiction of the Federal Establishment.

IV

That this cause arises under certain statutes of the United States, more specifically—Procedural Regulations of the Veterans Administration, October 5, 1962, MP-5, TS-123; which provides in pertinent part:

"11. Annual Review and Rating

Each year, on or shortly after April 30 (June 30 for station Managers and Directors and Assistant

Managers and Assistant Directors) every supervisor will review the performance of each of his immediate subordinates, and will assign each a performance rating which will reflect typical performance requirements of the employee's position, except that:

* * * * * * * *

d. For an employee in a period of warning of unsatisfactory performance on the established rating date, the rating will be delayed till the end of the warning period.

e. For an employee on notice on the rating date of proposed adverse action for inefficiency, or awaiting action to reassign, demote, or remove him for inefficiency following decision on such notice, no rating will be made unless and until the matter is resolved in the employee's favor. If and when the matter is thus favorably resolved, the employee will be informed that his rating is satisfactory.

"12. Period of Service Covered

The beginning of a rating period will be the date of entry into a position, the day following the end of the previous rating period, or 1 year prior to end of the current period, whichever is later. The end of the rating period will be the due date of the rating (April 30, June 30) except when the end of the period is delayed as provided in paragraph 11d."

VA Personnel Policy Manual, MP-5, TS-118, July 1, 1962, at pages 12A-6, and 12A-7, provides—

". . . before taking action to remove an employee for inefficiency, the supervisory official should consider reassignment, if there is a vacant position in which the employee could reasonably be expected to perform adequately. A pertinent factor is whether the employee had previously performed satisfactorily in a different line of work or at a lower grade level.

14(f) (1) . . . The advance notice of proposed demotion or removal will state the requirement of the

position and how the employee failed to meet them. These factors must be fully recited to comply with the requirements of specificity.

The charges must not consist solely of incidents which occurred prior to the assignment of the current satisfactory rating but rather should relate primarily to subsequent developments." (Emphasis added)

That the United States Civil Service Commission, Federal Personnel Manual,, Subchapter 2, Chapter 430, Performance Evaluation, at pages 430-6, paragraph 2-4(d), provides—

"That employees of GS-10 and below must be rated at least annually, and employees of GS-11 and above must be rated at least eighteen months."

(a) That plaintiff's rating was "Satisfactory" April 12 or 30, 1962, which in effect established his subsequent "Official Rating Dates", at eighteen months intervals—(1) October 12 or 30, 1963; and (2) April 12 or 30, 1965.

(b) That defendants' agent, Chin Fun Kwok, Director of Specification Service, Veterans Administration, stated in a communication to plaintiff, dated October 21, 1963:

Dear Mr. Armstrong:

1. You are notified that because of a procedural error in our Advance Warning of Unsatisfactory Rating of February 28, 1963, it is being withdrawn. Because of this, your rating as of April 30, 1963, is Satisfactory.

2. That portion of the memorandum of June 20, 1963 which deals with technical deficiencies in your work remains in effect without change.

V

That subsequent to June, 1964, plaintiff has sought continuously to have this separation action rescinded and reinstatement effected. Plaintiff has made multiple timely appeals to defendants, all to no avail. That the most recent

effort—*Armstrong* v. *The United States* (Court of Claims, 1969), 405 Federal Second Series 1275. In that case, defendants performed an act of fraud upon the Court of Claims to obtain judgment against plaintiff.

VI

That plaintiff's separation as described above was contrary to and in violation of the law and "procedural regulations" of the United States Civil Service Commission and Veterans Administration. Supra. Allegation IV, pages 3 and 4 of this Complaint; and therefore invalid, null and void, and of no effect for the following specific reasons:

(a) That employees of GS-10 and below must be rated at least annually, and employees of GS-11 and above must be rated at least eighteen months.

(b) That the assignment of a "Satisfactory Rating" issued October 21, 1963 or "withdrawal" of "Unsatisfactory Rating" was defective for the reason that the "Pending Statement of Charges" were resolved adversely to Plaintiff.

(c) Plaintiff is or was entitled to a "Satisfactory Rating" "only" if the "Pending Statement of Charges" were or was resolved in Plaintiff's favor.

(d) That plaintiff, as a GS-11, was rated "Satisfactory" April 12, 1962, which in effect established his subsequent "Official Rating Dates" at eighteen months intervals—(1) October 12 or 30, 1963; and (2) April 12 or 30, 1965.

(e) That there is no "proviso" in the Veterans Administration "procedural regulations" authorizing or permitting the agency to "amend", or "alter", or "modify", or "withdraw" an "Assigned Rating". In other words, the agency must begin or commence "removal proceedings" anew.

(f) That the "Statement of Charges" consisted "solely" of incidents which occurred prior to the assignment of the "satisfactory rating, Official established rating date October 12 or 30, 1963; but rather should relate primarily to subsequent developments; and

(g) Plaintiff was under one continuous warning period from February 28, 1963 through October 21, 1963.

VII

That plaintiff's separation, as described above, was contrary to and in violation of the law and the procedural regulations, and therefore invalid, null and void, and of no effect for the following additional reasons:

(a) That the United States Civil Service Commission, United States Department of Justice, and The Veterans Administration have performed acts or act of fraud upon the Federal Courts in obtaining judgments and orders against the following litigants in the administration of the Federal Personnel Laws in general and more particularly section fourteen of the Veterans' Preference of 1944, as amended—

(i) Bander versus United States, 141 Court of Claims 373; and

(ii) Kirkpatrick versus Gray, et al., and Donaldson versus Priestly, 198 F. 2d 533.

(b) That on or about March 7, 23, and 30, 1950, the Chief Law Officer (Mr. Alfred Klien) and Chairman of the United States Civil Service Commission testified before the Committee on Post Office and Civil Service, House of Representatives, 81st Congress, 2d Session, on H. R. 7439 (now Public Law 733) and presented a consummate exposition of the meaning of the Federal Personnel Laws. See Hearings, Library of Congress, Reference JK 730.A5 (1950b).

WHEREFORE, plaintiff prays that this Court enter a judgment declaring:

1. That defendants' removal of plaintiff as of June, 1964, from the Federal Service was in violation of the laws of the United States and of the procedural regulations of the United States Civil Service Commission, and the Veterans Administration, and is null and void; and

2. That an injunction shall issue enjoining defendants from continuing to refuse to consider plaintiff's removal as a violation of existing laws and procedural regulations and therefore a nullity; and

3. That defendants take such action as may be necessary to reinstate plaintiff in the position from which he was thus wrongfully removed.

4. And for such other relief as may be just.

CHARLES R. ARMSTRONG, *Plaintiff*,
12 Underwood Place, Northeast,
Washington, District of Columbia 20012

DISTRICT OF COLUMBIA, SS:

Charles R. Armstrong, being first duly sworn, deposes and asserts that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

CHARLES R. ARMSTRONG, *Plaintiff*

SUBSCRIBED AND SWORN TO before me this 13th day of November, 1969.

JOSEPH P. IMLER
Notary Public, District of Columbia

My Commission Expires: July 1, 1970.

APPENDIX C

[RECEIVED AUGUST 4, 1971]

IN THE UNITED STATES COURT OF CLAIMS

CHARLES R. ARMSTRONG, *Plaintiff,*	)	
v.	)	No. 86-71
THE UNITED STATES, *Defendant.*	)	

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PETITION

Plaintiff opposes defendant's application for an order to dismiss the Petition and for reasons and grounds stated in the affidavit with exhibits attached hereto and made a part hereof.

For the purpose of testing the legal sufficiency of the Petition, the Court must accept the allegations of the Petition as true.[1] Plaintiff made timely applications to amend[2] the Petition and make discovery[3] for use in supplementing or opposing defendant's motion to dismiss the Petition, but without avail.

---

[1]Gardner v. Toilet Goods Ass'n (1967), 387 U.S. 167, at 172; Clark v. Uebersee Finanz-Korporation (1947), 332 U.S. 480, at 482; 2A J. Moore, Federal Practice, sec. 12.08 (1968).

[2]See Docket Entries of this Case: July 7, 1971—"Plaintiff's motion for leave to amend the petition filed."

[3]Docket Entry: June 21, 1971—"Plaintiff's motion for leave to make discovery filed . . . . DENIED JULY 9, 1971 . . . "

I. PLAINTIFF'S INSTANT CAUSE OF ACTION IS NOT BARRED BY RES JUDICATA.

Res Judicata[4] is not applicable to the instant proceedings. This is an equitable proceeding in the nature of a direct attack on a judgment of this Court to avoid, correct, vacate, annul, review, cancel, or set aside the judgment in a proceeding or manner provided by law[5] for such purpose. In a direct, as distinguished from a collateral attack on a judgment the judgment—does not operate as res judicata precluding relief. The instant judgment was obtained by fraud or collusion and cannot be used as a basis for the application of the doctrinee of res judicata.[6]

II. JURISDICTION IS ANCILLARY.

When the Independent Action for fraud upon the Court is filed in the same Court rendering the disputed judgment, jurisdiction is ancillary. It is stated as follows:

> CLERK'S OFFICE, July 30, 1971, Washington, D. C.
>
> To: Attorney of Record and Assistant Attorney General, and Commissioner Wood
>
> Sirs: Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for leave to amend the petition the following order: DENIED, as unnecessary."

---

[4] "*JUDGMENTS*"—50 CJS, section 594; cf., Scott v. Dilks, 47 Cal. App. 2d 207, 117 P.2d 700; Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944), 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250.

[5] "Independent Action", Rule 152, Court of Claims. Cf.—Rule 60(b), Federal Rules of Civil Procedure.

[6] See—In Re Hess' Estate, 379 P.2d 851, at 855 (app. dismissed & cert. denied, 375 U.S. 45, 84 S.Ct. 157; and footnote 4, supra.

CONCLUSION

For the foregoing reasons, plaintiff's opposition to defendant's application for an order to dismiss the Independent action should be sustained. See—*"Substantive Basis For Independent Action"*, 7 Moore's Federal Practice (2d ed.) 606, Paragraph 60.37.

Respectfully submitted,

/s/Charles R. Armstrong, Plaintiff,
12 Underwood Place, Northeast,
Washington, D. C. 20012

[CAPTION OMITTED IN PRINTING]

AFFIDAVIT OF PLAINTIFF

District of Columbia, ss:

Charles R. Armstrong, plaintiff herein, being first duly sworn deposes and asserts:

I.

(a) Exhibit "A": Letter dated July 26, 1963, signed by Chin Fun Kwok, Director, Specifications Service—reads in significant part:

> "2. Paragraph 7 to read as follows:
>
> "7. Copy of this extension of 90 days from the date of expiration of the original 90 days warning notice period given you on February 28, 1963, is being inserted in your personnel record."

(b) Exhibit "B": Letter dated August 23, 1963, signed by Chin Fun Kwok, Director, Specifications Service—reads in pertinent part:

"Your second 90 day warning period terminates on August 27, 1963. At the Conference on July 26, at which Mr. Schaller reviewed your work for the previous 30 days, . . . You are herewith given an opportunity to request a 30 day extension of the warning period . . . . "

(c) Exhibit "C": Letter dated August 30, 1963, signed by Chin Fun Kwok, Director of Specifications Service:

". . . You will report to your regular duty in Munitions Building on September 3, 1963. This extension postpones the end of your warning period until October 3, 1963, at which time you will be evaluated."

II

(a) Plaintiff was given a rating October 4, 1963 and the procedural error was consummated by making the rating retroactive and effective as of April 30, 1963. Mr. Charles F. Field, Fair Employment Practice Officer, Veterans Administration, stated December 17, 1963, at page 14—"Supplemental Investigation of Reprisal Actions Filed by Mr. Charles R. Armstrong, Architectural Engineer (Specifications) Division, Specification Service, OAA/Construction, on October 4 and 28, 1963"—

"REPRISAL COMPLAINT DATED OCTOBER 28, 1963"

" . . . The letter of February 28, 1963 was felt to be administratively inadequate as it did not list specifically, the technical work deficiencies in Albany, New York project, but the list of deficiencies was not made a part of the warning document. For this reason, the letter was withdrawn by letter of October 4, 1963 and, because of the procedural error, the rating as of April 30, 1963 of satisfactory was given Mr. Armstrong. Letter of October 21, 1963 also stated that the technical deficiencies in Memorandum of June 20, 1963 . . . remained in effect. On the same date Mr. Armstrong was given a notice of Pro-

posed Removal for Inefficiency . . . which specified the errors on which management was basing its claim of inefficiency."

III

(a) Defendant asserted that plaintiff had a satisfactory rating April 30, 1963 which was irregular for the reason that plaintiff was under an extended or continuous warning period from February 28, 1963 through October 21, 1963. The specific acts or act of Fraud is admitted by defendant by filing the motion to dismiss–allegations IV & VI are true.[1]

(b) Mr. Frank Peartree, Clerk of this Court, in his efforts to place form over substance, stated to plaintiff July 19, 1971, in rejecting a timely filed pleading–"Plaintiff's Request for Review of Clerk's or Commissioner's Action":

"Re-label and resubmit"

(c) A copy of the statement of Mr. Peartree and the Pleading is annexed hereto and made a part hereof.

Further affiant saith not

Charles R. Armstrong, Affiant

SUBSCRIBED AND SWORN TO
before me this 2nd day of August, 1971.

My Commission Expires: January 31, 1973

Doris H. Emeigh
Notary Public, D. C.

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[1]Petition, filed herein April 15, 1971: Gardner v. Toilet Goods Ass'n (1967), 387 U.S. 167, at 172; Clark v. Uebersee Finanz-Korporation (1947), 332 U.S. 480 at 482; 2A J. Moore, Federal Practice, section 12.08 (1968).

[Exhibit A]

UNITED STATES GOVERNMENT

MEMORANDUM

TO: Mr. C. R. Armstrong (085A) **DATE:** July 26, 1963

FROM: Director, Specifications Service (085)

SUBJECT: Performance Evaluation

1. This memorandum amends Mr. Williams' memorandum to you of June 20, 1963. Paragraph 6 is amended as follows:

> "6. Accordingly, your work performance will be further observed for 90 days from the date of expiration of the preceding unsatisfactory warning notice."

2. Paragraph 7 to read as follows:

> "7. Copy of this extension of 90 days from the date of expiration of the original 90 days warning notice period given you on February 28, 1963, is being inserted in your personal record."

CHIN FUN KWOK

[Exhibit B]

VETERANS ADMINISTRATION
ASSISTANT ADMINISTRATOR FOR CONSTRUCTION
Munitions Building
WASHINGTON 25, D. C.

August 23, 1963

Your File Reference:

In Reply Refer To: 085

Mr. C. R. Armstrong
662 Jefferson St., N. E.
Washington 11, D. C.

Dear Mr. Armstrong:

Your second 90 day warning period terminates on August 27, 1963. At the Conference on July 26, at which Mr. Schaller reviewed your work for the previous 30 days, you were informed that your work was unsatisfactory.

In as much as you were on sick leave during much of the last month and have had no opportunity to do work on which you may have shown improvement to a satisfactory level of performance, you are herewith given an opportunity to request a 30 day extension of the warning period. This extension would start on the day you return to work. The request for extension must be received in this office on or before the end of the warning period.

If you wish no extension you will be evaluated on August 27, 1963.

Yours very truly,

CHIN FUN KWOK
Director
Specification Service

[Exhibit C]

Mr. C. R. Armstrong
662 Jefferson St., N. E.
Washington 11, D. C.

Dear Mr. Armstrong:

We acknowledge your telephone request for a 30 day extension to your warning period. You will report to your regular duty in Munitions Building on September 3, 1963. This extension postpones the end of your warning period until October 3, 1963, at which time you will be evaluated.

My July 26, 1963 memorandum to you about your within grade increase stated that a new determination will be made by September 27, 1963. This date is herewith changed to November 3rd, 1963.

Yours very truly,

CHIN FUN KWOK
Director
Specification Service

APPENDIX D

UNITED STATES COURT OF CLAIMS

CHARLES R. ARMSTRONG 12 Underwood Place, N.W. Washington, D.C. 20012	)	
v.	)	Case No. 86-71
THE UNITED STATES	)	

Mar. 11, 1971 - Record as transferred from Dist. Ct. filed.

DOCKET ENTRIES

1971

Mar. 11	Record as transferred from U.S. District Court for District of Columbia (Dkt. No. Civil Action 3230-69) filed. Parties notified. Fees paid in Dist. Ct. (Record consists of one Acco bound file).
Mar. 18	Plaintiff's motion for discovery and relief filed. Copies (2) to deft. DENIED APR 8 1971, see comr's. order.
Mar. 23	Plaintiff's application for enlargement of time (15 days after completion of discovery) to file petition filed. Copies (2) to deft. DENIED APR 8 1971, see comr's. order.
Mar. 29	Defendant's opposition to motion for discovery, etc. filed. Copies (2) to pltf.
Apr. 2	Court filed order referring case to Commissioner Harry E. Wood.
Apr. 6	Plaintiff's reply to defendant's opposition filed. Copies (2) to deft.

Apr. 8	Commissioner's order re motion for discovery, etc. filed. Copy to parties. (pltf. to file petition within 15 days)
Apr. 15	Plaintiff's petition filed. Copies (3) to deft.
Jun. 14	Defendant's motion to dismiss plaintiff's independent action filed. Copies (3) to pltf.
Jun. 21	Plaintiff's motion for extension of time (until 30 days subsequent to determination of pending motion re discovery) to file response to motion to dismiss, etc. filed. Copies (2) to deft. ALLOWED SEE ENTRY THIS DATE JULY 9 1971.
Jun. 21	Plaintiff's motion for leave to make discovery filed. Copies (2) to deft. DENIED JULY 9, 1971 SEE ENTRY THIS DATE, PAGE 3.
Jul. 1	Defendant's opposition to plaintiff's motion for leave to make discovery filed. Copies (2) to atty.
Jul. 7	Plaintiff's reply to defendant's opposition to plaintiff's motion for leave to make discovery filed. Copies (2) to deft.
Jul. 7	Plaintiff's motion for leave to amend the petition filed. Copies (2) to deft. DENIED JUL 30 1971, as unnecessary.
Jul. 9	Re: plaintiff's motion for extension of time filed June 21, 1971; ALLOWED JUNE 9 1971, in that plaintiff's time to respond to defendant's motion to dismiss is extended to 30 days from the denial this date of plaintiff's motion for leave to make discovery.
Jul. 9	Re: plaintiff's motion filed June 21, 1971 for leave to made discovery DENIED, without prejudice to renewal by plaintiff after disposition by the court of defendant's motion to dismiss and without prejudice to plaintiff's setting

	forth in his response to defendant's motion to dismiss such basis as he can show for his contentions that the prior judgment of this court (186 Ct. Cl. 539) was obtained by fraud practised on the court by defendant and why the said prior judgment of this court is not dispositive of this case.
Jul. 19	Defendant's opposition to plaintiff's motion for leave to amend the petition filed. Copies (2) to atty.
Jul. 23	Plaintiff's reply to opposition of defendant to plaintiff's motion for leave to amend petition filed. Copies (2) to deft.
Aug. 4	Plaintiff's opposition to motion to dismiss petition filed. Copies (3) to deft.
Aug. 17	Defendant's motion for extension of time (to September 3, 1971) to reply to opposition to motion to dismiss filed. Copies (2) to pltf. ALLOWED AUG 31 1971.
Sep. 3	Defendant's reply to opposition to motion to dismiss petition filed. Copies (4) to pltf.
Sep. 3	Submitted to the court on defendant's motion to dismiss, etc.
Oct. 29	Court entered order granting defendant's motion to dismiss the petition and dismissing the petition. Copy to parties.
Nov. 23	Plaintiff's notice of intention to apply for writ of certiorari [request for record in re certiorari] filed. Copies (3) to deft.